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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 374

TICONIC NATIONAL BANK,
PEOPLES-TICONIC NATIONAL BANK, and
ARTHUR G. PICHER, AS RECEIVER OF BOTH SAID BANKS,
Petitioners,

v.

LOTTIE F. SPRAGUE AND MARGARET DAVIS SPRAGUE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Your petitioners, Ticonic National Bank, Peoples-Ticonic National Bank, and Arthur G. Picher as Receiver of both said banks by appointment of Comptroller of the Currency, respectively pray that a writ of certiorari issue to review

the final decree of the United States Circuit Court of Appeals for the First Circuit, rendered in the above case on June 1, 1937 (R. 64).

Opinions of the Courts Below.

The opinion of the United States District Court for the District of Maine appears on pages 47-52 of the record and is reported in 14 Fed. Supp. 900. The *per curiam* opinion of the Circuit Court of Appeals affirming the original decree of the District Court but striking out the allowance of interest subsequent to the date of insolvency appears on page 63 of the record and is reported in 87 F. (2d) 365. The opinion of June 1, 1937, of the Circuit Court of Appeals upon rehearing appears on pages 57-62 of the record and is reported in 90 F. (2d) 641.

Jurisdiction.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on June 1, 1937 (R. 64). Jurisdiction is conferred upon this court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (U. S. Code, Title 28, Sec. 347.)

Summary Statement of the Matters Involved.

On July 29, 1935, the respondents as plaintiffs filed in the District Court of the United States for the District of Maine their bill of complaint against Ticonic National Bank, Peoples-Ticonic National Bank, and Arthur G. Picher as Receiver of both banks (R. 2). The bill alleged in substance that plaintiffs had delivered to the Ticonic National Bank, prior to its insolvency, the amount of $5,022.18, under a certain trust agreement. Under the bill, the plaintiffs sought to establish a lien on certain bonds or the proceeds thereof, which bonds had originally been segregated

by the Ticonic National Bank to secure the aforesaid, and other trust funds which the bank received in its Trust Department, but which it had deposited in the Commercial Department of the bank under the provisions of Section 11 (k) of the Federal Reserve Act, Section 248 (k), Title 12, U. S. C.

Previous to August 3, 1931, there were two national banks in Waterville, Maine,—the Ticonic National Bank and the Peoples National Bank. On that date the Ticonic National Bank sold practically all of its assets to the Peoples National Bank under the provisions of a contract by which the Peoples National Bank undertook and agreed to pay the deposit liabilities of the Ticonic National Bank in full (R. 39). The Peoples National Bank then changed its name to the Peoples-Ticonic National Bank. The Ticonic National Bank then went into voluntary liquidation under Section 5220, U. S. R. S. (U. S. C., Title 12, Sec. 181) (R. 48).

Included in the deposit liabilities assumed by the Peoples National Bank was an account reflecting a balance of $10,127.66. This was the account in which the Ticonic National Bank, as fiduciary, carried its uninvested trust funds deposited in the Commercial Department under the permissive provisions of Section 11 (k) of the Federal Reserve Act, 248 (k), Title 12, U. S. Code. Included in the total due the several trust estates was an item of $4,882.18, which represented the balance due on the Lottie F. Sprague trust. After August 3, 1931, the Ticonic National Bank no longer operated as a going commercial bank but did retain its Trust Department and continued to perform its functions as fiduciary of trust estates; and as funds were collected belonging to the respective trusts it deposited same in the aforesaid checking account which it carried in the Peoples-Ticonic National Bank. From time to time, as funds were needed for distribution in connection with the respective trust estates being administered by the Ticonic National Bank, said bank drew its trust checks upon itself (R. 49) which, when presented to the Peoples-Ticonic National

Bank, were charged against the above-mentioned checking account in the Peoples-Ticonic National Bank. Several such withdrawals were effected by checks payable to the beneficiaries of the Lottie F. Sprague trust so that as of the date suit was brought the balance due was $3,649.65.

When the above-mentioned checking account was carried in the Ticonic National Bank while it was a going concern, and previous to the aforesaid sale of its assets on August 3, 1931, it was secured by certain Kingdom of Denmark bonds in the principal amount of $20,000 segregated in the Trust Department of said bank consistent with the previsions of Section 11 (k) of the Federal Reserve Act, Section 248 (k), Title 12, U. S. C. On August 3, 1931, when the Peoples National Bank purchased substantially all of the assets and assumed all of the deposit liabilities of the Ticonic National Bank, the Kingdom of Denmark bonds were included in the assets purchased. On March 4, 1933, the Peoples-Ticonic National Bank suspended and for awhile was in conservatorship, and later, November 6, 1933, the petitioner, Arthur G. Picher, was appointed receiver (R. 4). At the date of suspension the amount on deposit in the commercial checking account of the Peoples-Ticonic National Bank to the credit of the Ticonic National Bank as trustee of the various trusts, including the Sprague trust, was $12,462.21 (R. 46). The amount then due on the Lottie F. Sprague trust was $4,099.83 (R. 46), which amount was later reduced by payments made by the conservator, to $3,649.65 (R. 49). Between the dates of August 3, 1931, and June 28, 1934, the Ticonic National Bank was in voluntary liquidation. On the latter date your petitioner, Arthur G. Picher, was appointed receiver of that bank also (R. 4). The Kingdom of Denmark bonds were subsequently sold by the receiver of the Peoples-Ticonic National Bank for an amount in excess of $20,000.

The District Court rendered an opinion on May 29, 1936, (R. 47), holding that respondents were entitled to payment of the sum of $3,649.65 in full, with interest from the date

of the filing of the bill of complaint, and with costs. On June 6, 1936, a final decree was entered by the District Court sustaining the plaintiffs' bill and ordering the defendant, as Receiver of the Peoples-Ticonic National Bank, to pay plaintiffs the sum of $3,649.65 with interest from July 30, 1935, and providing that execution issue accordingly (R. 52).

Your petitioners appealed to the Circuit Court of Appeals for the First Circuit, which court, in a *per curiam* dated January 15, 1937, modified the decree by striking out the words "with interest from July 30, 1935," and as so modified affirmed the decree (R. 63). The final decree to this effect was entered on January 15, 1937 (R. 63).

Thereafter, upon the petition of the respondents and the petitioners, a rehearing was granted (R. 63).

On June 1, 1937, the Circuit Court of Appeals rendered an opinion to the effect that the respondents were entitled to a lien upon the proceeds of the Kingdom of Denmark bonds, originally segregated in the Trust Department of the Ticonic National Bank but later taken over by the Peoples National Bank and sold by the Receiver of the Peoples-Ticonic National Bank, for the amount of principal due and also for interest from the date of filing of the bill; namely, July 30, 1935 (R. 57). A final decree was entered confirming the original decree of the lower court with costs (R. 64).

Specification of Errors.

It is submitted that the Circuit Court of Appeals for the First Circuit erred:

1. In holding and deciding that the claimants were entitled to a lien upon the Kingdom of Denmark bonds or the proceeds thereof held by the Receiver of the Peoples-Ticonic National Bank;

2. In holding and deciding that the claimants were entitled to be paid interest out of the proceeds of said

securities for a period subsequent to March 4, 1933, the date of insolvency of the Peoples-Ticonic National Bank;

3. In holding and deciding that the claimants were entitled to be paid interest out of the proceeds of said securities for a period subsequent to the date of insolvency of the Ticonic National Bank;

4. In holding and deciding that execution should issue.

Statutes Involved.

Excerpts from Sec. 192, Title 12, U. S. C. (Revised Statutes, Sec. 5234):

> "Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.
>
> "PROVIDED, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: * * *"

Title 12, U. S. C., Sec. 194 (Revised Statutes, Sec. 5236):

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of

the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Excerpts from Section 248 (k), Title 12, U. S. Code (Sec. 11 (k) of the Federal Reserve Act):

"Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account *and shall not be used by the bank in the conduct of its business* unless it shall first set aside in the trust department United States bonds or other securities approved by the Board of Governors of the Federal Reserve System. (Italics ours.)

"In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank."

Questions Presented and Reasons for Allowance of Writ of Certiorari.

The Circuit Court of Appeals in affirming the decision of the District Court in this case has decided three important questions, each of which will be discussed under the following sub-headings:

1. If a national bank acting as a fiduciary under the provisions of Section 248 (k), Title 12, U. S. Code (Section 11 (k) of the Federal Reserve Act) deposits uninvested trust funds in a commercial checking account in another bank, are such funds thereby being used in the conduct of the business of the fiduciary bank and do they thus become entitled to the protection of assets segregated in the Trust Department of the fiduciary bank as security for trust funds held by the bank as fiduciary and being "used by the bank in the conduct of its business" under said statute?

(a) This precise question of Federal law which may affect all national banks having licenses to conduct fiduciary activities has not been, but should be, settled by this court in order that the Comptroller of the Currency in exercising his supervisory duties over national banks may apply with uniformity the correct rules. In the instant case there has been no contention by the respondents that the Peoples-Ticonic National Bank became the trustee of this trust, nor has there been any denial that from August 3, 1931, the funds of this trust estate, of which the Ticonic National Bank was trustee, were carried in a checking account in the Peoples-Ticonic National Bank.

(b) The decision of the Circuit Court of Appeals for the First Circuit established a rule that under the provisions of Section 248 (k), Title 12, U. S. Code (Section 11 (k) of the Federal Reserve Act), uninvested trust cash deposited by a national bank fiduciary in an account in the Commercial Department of another bank must, nevertheless, be secured by the fiduciary national bank in the same manner as is required if said trust funds were deposited in the Commercial Department of the fiduciary national bank.

It is submitted that, aside from controlling statutes permitting a fiduciary national bank to deposit uninvested trust funds in its *own* Commercial Department, it is under the same duty to avoid self-dealing by using trust funds in the conduct of its own business as applies to individual fiduciaries. The deposit of trust funds in a bank's own Commercial Department is self-dealing, and unless permitted by statutory provisions is subject to criticism as submitting the respective estates to the hazards of the conflicting interests of the fiduciary bank. See Bogart on Trusts and Trustees, Vol. 3, pages 1897 and 1901. In some states, fiduciary state banks are not permitted to deposit trust funds in their

own Commercial Departments. *First National Bank of Opp* v. *Weaver,* 142 So. 420; Bogart on Trusts and Trustees, Vol. 3, page 1901. It is believed that fiduciary banks are in no sense precluded from exercising the degree of care in avoidance of self-dealing exacted of individual fiduciaries, and therefore said fiduciary banks have the right to deposit their uninvested trust funds in some other bank so long as due care in the choice of the depositary is exercised. *Strauss* v. *United States Fidelity and Guaranty Company,* 63 F. (2d) 174.

If a national bank fiduciary does deposit its uninvested trust funds in another bank and accounts to the interested trust estates for any interest which the other bank may allow on the trust account maintained in that bank, it is no more using the funds in its own business than would be any other individual fiduciary who deposited the funds in the bank. It is that other bank that has the use of the funds and not the fiduciary bank. Although statutory provisions in various States and/or decisions of the courts have recognized that it is really too much to expect a bank to abandon its own facilities for handling funds and to deposit the uninvested trust funds in some other institution or else hoard the actual cash in its vaults, nevertheless, said fiduciary banks, in the absence of statutes providing otherwise, certainly are permitted to exercise either one of the alternatives. See *First National Bank of Opp* v. *Weaver, supra;* also, *Robinson* v. *Williams,* 159 So. 239. In the latter case, on page 241, the court said:

> "When a bank is named executor or guardian under a statute which authorizes it to act as such, there is, we think, an implied authority to make a deposit of the money so held in itself and there retained in the usual and customary manner *to the same extent that the bank as such guardian or executor could lawfully make the deposit in another bank, and could lawfully retain it there.*" (Italics ours.)

It is submitted that the provisions of Section 248 (k), Title 12, U. S. Code (Section 11 (k) of the Federal Reserve Act), merely permit a fiduciary national bank to engage in self-dealing with respect to uninvested trust funds by depositing same in its own Commercial Department, provided, however, that assets are segregated in the Trust Department to secure the debt thus created and due from the Commercial Department to the trust estates. No provision of the Act, however, precludes the national bank fiduciary from exercising the ordinary care of an individual fiduciary by depositing the uninvested trust funds in *some other* carefully chosen depositary, nor is any provision of the Act susceptible of the interpretation that uninvested trust funds deposited by the fiduciary national bank in some other bank must be secured by assets segregated in the Trust Department of the fiduciary bank.

If, therefore, the Ticonic National Bank as fiduciary in the instant case could have deposited the uninvested funds of the Sprague trust in another bank without being required to secure same by segregating assets in its own Trust Department, then it logically follows that it could properly, at any time, transfer trust funds on deposit in its own Commercial Department to another bank to be carried by that other bank in an account in favor of the Ticonic National Bank, Trustee, and, having thus transferred the funds, they would, of course, cease to be secured. The transaction between the Ticonic National Bank and the Peoples National Bank resulted in the balance due the Sprague estate being placed on deposit in the Peoples-Ticonic National Bank, and, therefore, coincidental with the transfer of the account to the Peoples National Bank (which later became the Peoples-Ticonic National Bank), the lien against the Kingdom of Denmark bonds was automatically released.

2. *Is a secured creditor entitled to interest for any period subsequent to the date of insolvency of a national bank when it appears that the proceeds of the pledged assets are sufficient to pay the principal and said interest but where the assets of the bank are insufficient to pay all creditors' claims in full plus interest, and is an order of court to pay such interest in conflict with the provisions of Section 194, Title 12, U. S. Code, relating to ratable distribution of the assets of national banks in receivership?*

(a) This precise question of Federal law frequently arising in the administration of the affairs of insolvent national banks has not been, but should be settled by this court in order that the Comptroller of the Currency, who is charged by law with supervision over the winding up of such banks may apply with uniformity the correct rules concerning such cases.

(b) The decision of the Circuit Court of Appeals for the First Circuit established a rule in the instant case that the lien claimant is entitled to interest on the principal due as of the date the bill of complaint is filed out of the proceeds of the security for the period from the date when the bill of complaint is filed up to the date of payment of the principal. This rule differs from and conflicts with the rules established by this Honorable Court, other Circuit Courts of Appeal and Lower Courts in cases dealing with secured creditors of insolvent national banks.

The status of secured creditors has been considered by this Honorable Court in the cases of *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, and *Aldrich* v. *Chemical National Bank,* 176 U. S. 618. In the case of *Merrill* v. *National Bank of Jacksonville, supra,* this Honorable Court stated the rule as to the rights of the secured creditor, page 147, as follows:

"Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of

insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."

The above rule was reiterated in the opinion of this Honorable Court in the case *Aldrich* v. *Chemical National Bank, supra,* at page 638.

Attention is invited to the fact that in both of the last-mentioned cases the lower courts had awarded interest upon dividends paid to creditors of insolvent national banks from the dates of the declaration thereof to the dates of payment to the claimants, and these lower court decisions were affirmed by this Honorable Court. But if the claimants were entitled to obtain interest on the principal of the debts up to the dates of payment either out of collateral or general dividends or both, and these sources were adequate for that purpose, the allowance of interest upon the dividends would result in a duplication of interest. Thus the inference can be drawn from said decisions that interest on the principal for any period subsequent to insolvency is not allowable unless the assets of the bank are sufficient to pay all creditors in full.

The following Circuit Courts of Appeal have adopted rules regarding the rights of secured creditors of insolvent national banks at variance with the decision of the Circuit Court of Appeals for the First Circuit in the instant case:

THIRD CIRCUIT: *Richman* v. *First Methodist Episcopal Church of Collingswood*, 76 F. (2d) 344, certiorari denied under caption *Long* v. *First Methodist Episcopal Church*, 296 U. S. 593.

In that case the court decided that a certain balance due the claimants had the status of uninvested trust funds deposited by the national bank fiduciary in its own Commercial Department and secured under the provisions of 11 (k) of the Federal Reserve Act, 248 (k), Title 12, U. S. Code. Nevertheless, the Circuit Court said, page 346:

> "Interest is not allowable, as a general rule, after property of an insolvent is in custodia legis. Ohio Savings Bank and Trust Co. v. Willys Corp., (C.C.A.) 8 F. (2d) 463, 44 A. L. R. 1162. This has been specifically ruled as to national banks. White v. Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603. • • •
>
> "In our opinion it was error to allow interest after March 24, 1933, the date of the appointment of the conservator."

FOURTH CIRCUIT: *Gamble* v. *Wimberly*, 44 F. (2d) 329.

In that case the court drew a parallel between the status of a secured creditor of an insolvent national bank and a secured creditor of a bankrupt in so far as interest subsequent to the date of insolvency was concerned and the Court applied the rules laid down by this Honorable Court in the case of *Sexton* v. *Dreyfus*, 219 U. S. 339. The Circuit Court of Appeals, in *Gamble* v. *Wimberly*, page 333, quoted the opinion of this Honorable Court in the case of *Merrill* v. *National Bank of Jacksonville*, *supra*, as follows:

> "*When secured creditors have received payment in full, their right to dividends and their rights to retain their securities cease,* but collections therefrom are not otherwise material."

And then the Circuit Court of Appeals for the Fourth Circuit comments as follows:

> "So, whether the trustee is entitled to interest depends upon what the Supreme Court intended shall constitute the 'full amount' of the claim. Was this intended to include interest subsequent to the date of the insolvency when, as we have seen from the explicit language of the Supreme Court, the liability in so far as the assets in the hands of the Receiver are concerned is made fixed and absolute? We believe that there is but one conclusion to be adopted from this language, and that is that such interest is not allowed unless and until all creditors have been paid the full amount of their claims with interest to the date of insolvency. If there should then remain a surplus in the hands of the Receiver, he may, and should, distribute the same equally among all creditors to the extent that it will cover interest due them."

The Circuit Court of Appeals for the Fourth Circuit then decided that the secured creditor of the insolvent national bank involved was not entitled to interest subsequent to the date of insolvency, either out of the proceeds of his collateral or general dividends, except that he could apply against interest accruing subsequent to the date of insolvency any interest or dividends accrued and collected upon the collateral itself subsequent to the date of insolvency of the bank.

NINTH CIRCUIT: *Douglass* v. *Thurston County*, 86 F. (2d) 899.

In that case the Circuit Court arrived at the conclusion that the secured claimants were not entitled to interest from any source for a period subsequent to the date of insolvency unless and until all creditors were paid in full. In support of this proposition on page 910, the Court referred to *Chemical National Bank* v. *Armstrong*, 59 Fed. 372; *Peoples National Bank* v. *Payne*,

26 F. (2d) 208; *Gamble* v. *Wimberly*, 44 F. (2d) 329; *Kershaw* v. *Jenkins*, 71 F. (2d) 647; *Richman* v. *First Methodist Episcopal Church*, 76 F. (2d) 344, certiorari denied under caption *Long* v. *First Methodist Episcopal Church*, 296 U. S. 593. It will be observed that this decision conflicts with an earlier decision of this same Circuit Court of Appeals in the case of *First National Bank of Forsyth* v. *Fidelity and Deposit Co. of Maryland*, 48 F. (2d) 585, where the claimant asserted and was allowed in part a preferred claim against the insolvent national bank there involved. The Circuit Court in that case allowed interest at the legal rate from the date of the decree of the lower court.

TENTH CIRCUIT: *Fash* v. *First National Bank of Alva, Okla.*, 89 F. (2d) 110.

In that case the Circuit Court of Appeals decreed that a secured creditor was not entitled to interest for any period subsequent to the date of insolvency of the national bank, the Court saying at page 112:

> "It is well settled that interest accruing on a claim after insolvency cannot be paid unless the assets are sufficient to pay all claims in full, because to pay interest on one while others are unpaid in whole or in part would violate the exaction of ratable distribution of assets. White v. Knox, supra; Kershaw v. Jenkins, supra; Anderson v. Missouri State Life Ins. Co. (C.C.A.) 69 F. (2d) 794; Richman v. First Methodist Episcopal Church (C.C.A.) 76 F. (2d) 344; Pinckney v. Wylie (C.C.A.) 86 F. (2d) 541; American National Bank v. Williams (C.C.A.) 101 F. 943. And that rule applies to a claim for a deposit secured by pledged collateral. Interest cannot be paid on such a claim whether it be public money deposited pursuant to the provisions of law, Douglass v. Thurston County (C.C.A.) 86 F. (2d) 899; In re American Bank & Trust Co. of Ardmore, 176 Okla. 202, 55 P. (2d) 470; or money of an individual deposited volun-

tarily, Gamble v. Wimberly (C.C.A.) 44 F. (2d) 329."

Cases have been decided by State Courts where the trust estates were protected by securities owned by national banks and deposited with the State authorities under Section 11 (k) of the Federal Reserve Act, Section 248 (k), Title 12, U. S. Code, and in certain of such cases surcharges have been awarded against the national bank fiduciaries with a disallowance of interest for any period subsequent to the date of insolvency. One such case is *In re Lemp,* 283 N. Y. S. 766, where security was on deposit with the Superintendent of Banks of the State of New York. The Appellate Division of the Supreme Court of the State of New York said, page 768:

> "In such cases the law requires ratable distribution (Title 12, U. S. C. A. 194). No interest is allowed on any claim against an insolvent national bank until after the principal of all claims, with interest to the date of insolvency, has been paid in full. White v. Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603; Hallett v. Fish, (C.C.) 123 Fed. 201. If a surplus then remains, the receiver may make ratable distribution of accrued interest. Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 S. Ct. 360, 43 L. Ed. 640; Gamble v. Wimberly (C.C.A.) 44 F. (2d) 329. The effect of allowing interest on the petitioner's claim for the period subsequent to March 3, 1933, is to accord her a preference as against other creditors to whom interest will not be allowed."

In establishing rules respecting the rights of secured creditors to interest accruing subsequent to insolvency, the several Circuit Courts of Appeal have relied in part upon decisions of this Honorable Court and upon the decisions of other Circuit Courts of Appeal in cases dealing with unsecured and so-called preferred creditors. For this reason a brief reference to those cases seems pertinent.

(1) Cases Involving Unsecured Creditors.

In the cases of *White* v. *Knox,* 111 U. S. 784, 787, and *Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470, this Honorable Court determined that an unsecured creditor of an insolvent national bank is not entitled to interest for any period subsequent to the date of insolvency unless and until all creditors have been paid the principal amounts of their claims in full and in the latter event all creditors are equally entitled to interest to the extent that the assets are adequate for that purpose.

The rule established by this Honorable Court in the above cases has been followed by Circuit Courts of Appeal and District Courts as illustrated by the following cases:

Peoples National Bank v. *Payne,* 26 F. (2d), 208, 209 (C. C. A. 8); *Kershaw* v. *Jenkins,* 71 F. (2d) 647, 650 (C. C. A. 10); District Courts: *Hallett* v. *Fish,* 123 Fed. 201, 203; *Dunnagan* v. *Best,* 59 F. (2d) 795, 796.

(2) Cases Involving Preferred Claims.

In cases where claimants have been allowed, so-called, preferred claims, the Circuit Courts of Appeal and District Courts have almost uniformly declined to allow interest on the amounts due for any period subsequent to the date of insolvency as shown by the following cases: *Richardson* v. *Louisville Banking Co.,* 94 Fed. 442, 449 (C. C. A. 5); *Butler* v. *Western German Bank,* 159 Fed. 116, 117 (C. C. A. 5); *Anderson* v. *Missouri State Life Ins. Co.,* 69 F. (2d) 794, 799 (C. C. A. 6); *Peoples National Bank* v. *Moore,* 25 F. (2d) 599, 601 (C. C. A. 8); *Merchants National Bank of Helena* v. *School District,* 94 Fed. 705, 709 (C. C. A. 9); District Courts: *Clark Sparks & Sons Mule & Horse Co.* v. *Americus National Bank,* 230 Fed. 738, 742; *Smith*

Reduction Corporation v. *Williams,* 15 F. (2d) 874, 875.

The reasons for the disallowance of interest subsequent to the date of insolvency in preferred claim cases are stated in *Richardson* v. *Louisville Banking Co., supra,* on page 449 as follows:

"The decree of the court below allows interest against the receiver from judicial demand. We are of opinion that this was erroneous. The funds collected, coming into the hands of the receiver, turned over to the comptroller, could not earn interest, and any interest to be paid thereon would be necessarily taken from some other trust fund."

It is submitted that the confusion of rules adopted by the several Circuit Courts of Appeal, District Courts, and State Courts respecting the rights of a secured creditor of an insolvent national bank to interest for any period subsequent to the date of insolvency necessitates clarification and final determination by this Honorable Court.

3. *Is a creditor of an insolvent national bank who is allowed a lien on a specific fund in the hands of the receiver of a national bank other than the debtor bank entitled to the issuance of execution in enforcement of said lien?*

(a) This precise question of Federal law has not been but should be settled by this court in order that the Comptroller of the Currency who is charged by law with supervision over the winding up of such banks may apply the correct rules concerning the treatment of claims of this nature.

It should be pointed out that the Kingdom of Denmark bonds involved in this case were owned by the Peoples-Ticonic National Bank and were sold by the Receiver and the proceeds remitted to a properly designated depositary subject to the order of the Comptroller of the Currency, as prescribed by Section 192,

U. S. Code, Revised Statutes 5234. With this in mind, it would appear that the decision of the Circuit Court of Appeals for the First Circuit regarding the issuance of execution is in conflict with the principles established by this Honorable Court in the case of *First National Bank of Bethel* v. *National Pahquioque Bank*, 81 U. S. 383, in which case this court said, pages 401-402:

> "Claims presented by creditors may be proved before the Receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association, but the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comtroller of the Currency, and be content with a just and legal distribution of proceeds of the assets collected by the receiver and liquidated by the Comptroller according to the Act of Congress in such case made and provided."

A similar position was taken in the case of *Eastern Townships Bank* v. *Vermont National Bank of St. Albans*, 22 Fed. 186, 189, and in the case of *Richardson* v. *Louisville Banking Company*, 94 Fed. 442, 449, where the Circuit Court of Appeals for the Fifth Circuit held that it was error for the lower court to summarily direct the payment of the fund within a brief time limit. The decision of the Circuit Court of Appeals for the First Circuit would appear also to be in conflict with the logic of the cases of *Port Newark National Bank* v. *Waldron*, 46 F. (2d) 296; *Liberty National Bank* v. *McIntosh*, 16 F. (2d) 906, cert. denied 273 U. S. 783; *Steele* v. *Randall*, 19 F. (2d) 40; *Earle* v. *Pennsylvania*, 178 U. S. 449; *Earle* v. *Conway*, 178 U. S. 456, which

cases limit the powers of both State and Federal Courts to interfere with the ordinary administration of insolvent national banks by the Comptroller of the Currency and protect the Receiver from summary execution and levy. It would appear that the proper rule is that the judgment should have been certified to the Comptroller of the Currency for payment in due course of administration, as indicated by the Circuit Court of Appeals for the Fifth Circuit in the case of *Merrill* v. *First National Bank of Jacksonville*, 75 Fed. 148, at 153, the decision of which court was affirmed by this Honorable Court in 173 U. S. 131.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities show that the decisions of the courts below were erroneous. In the interest of uniformity of decisions applicable to the administration of all insolvent national banks, and in order that the present doubt as to the correct rules of law to follow may be settled, it is urged that this Honorable Court entertain a review of this case on writ of certiorari.

Respectfully submitted,

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